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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL EDDIE TOWEY, Defendant and Appellant.	F034435 (Super. Ct. No. 99CM5544) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Lynn C. Atkinson, Judge.

Michael Berger, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert P. Anderson, Senior Assistant Attorney General, Shirley A. Nelson and Paul E. O'Connor, Deputy Attorneys General, for Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of the Facts and parts II, III, IV, V, VI, VII,VIII, and IX.

On August 31, 1999, a jury found appellant Michael Eddie Towey guilty of felony transportation of methamphetamine and the misdemeanors of possession of marijuana, being under the influence of a controlled substance, and giving false identification to a police officer. The trial court found as true enhancement allegations of a prior serious or violent felony conviction for attempted robbery, a prior conviction for possession for sale of a controlled substance, and prior prison terms for both of these convictions. Appellant was sentenced to an 11-year prison term.

Appellant filed a timely appeal claiming (1) the trial court erred by not obtaining appellant's personal waiver of the use of CALJIC Nos. 2.60 and 2.61, (2) proper instructions about proof of the required mental states were not given, (3) the trial court erred by not giving sua sponte instructions regarding voluntary intoxication, (4) he was not under "detention" for purposes of Penal Code section 148.9[1] at the time he falsely identified himself to a police officer, (5) the transportation of methamphetamine conviction was not supported by substantial evidence, (6) the transportation of methamphetamine conviction must be reversed because the trial court did not give CALJIC Nos. 3.00 or 3.01 regarding aiding and abetting, (7) the trial court erred by failing to advise appellant of his *Boykin-Tahl-Yurko*[2] rights before his admission of the enhancement allegations, (8) the use of CALJIC No. 17.41.1 infringed upon appellant's constitutional right to trial by jury, and (9) the use of CALJIC No. 17.42 prohibiting the jury from considering the penalties or punishments was prejudicial error.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*); *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*); and *In re Yurko* (1975) 10 Cal.3d 857 (*Yurko*).

We will affirm the convictions, reverse the findings of the enhancement allegations and remand for further proceedings. In the published portion of this opinion we address the issue of whether a defendant must personally waive the giving of CALJIC Nos. 2.60 and 2.61 regarding a defendant not testifying. The facts of this case are unnecessary to the published portion of this opinion.

FACTS*

At about 2:30 a.m. on June 17, 1999, Lemoore Police Officer Ken Wedderburn was parked in a church parking lot in the city of Lemoore while on patrol in a marked patrol car. Wedderburn was in uniform. A blue Pontiac Grand Am with its taillights out passed his location. Wedderburn caught up to the Grand Am, made the vehicle stop, approached the driver's side of the vehicle, and contacted the driver who identified himself as Billy Cabral. Appellant was in the passenger's seat.

At the time of the stop, Cabral and appellant each were holding a wrapper containing fast food, which they were eating. There was a Taco Bell bag on the passenger's side floorboard. When Cabral reached for his wallet in his shirt pocket, Wedderburn was standing next to the driver's door and could see the wallet held a packet of ZigZag rolling papers. Such rolling papers are sometimes used for marijuana. Wedderburn asked Cabral to exit the vehicle; Cabral asked if he could bring his food with him and Wedderburn said he could. Cabral got out with his food and soda and Wedderburn held Cabral's soda because Cabral had a broken hand or arm. Wedderburn searched Cabral and found nothing other than the rolling papers. While Wedderburn was speaking with Cabral outside the vehicle, Wedderburn was able to observe appellant, who was reaching inside the Taco Bell bag, moving about the vehicle on the passenger's side,

* See footnote, *ante*, page 1.

and eating. Officer Young arrived at the scene while Wedderburn was talking to Cabral outside the car. Officer Young exited his vehicle and assisted by standing near the right rear of the Grand Am and watching appellant.

Wedderburn then obtained Cabral's consent to search the car. Wedderburn searched the driver's side compartment of the car and then went around to the passenger's side, contacted appellant and asked him to exit the vehicle. Wedderburn asked appellant his name and was told, "Michael Sawyer." The record is not clear whether appellant was asked to identify himself when the officer "contacted" him inside the car or after the officer asked him to exit the vehicle. When Wedderburn asked appellant for identification, appellant said he did not have any. Wedderburn then asked appellant if he had any weapons or narcotics on his person and appellant stated he did not. Wedderburn asked if he could check and appellant consented. Wedderburn conducted a pat down search of appellant and felt a lump in appellant's right sock. Wedderburn asked appellant what it was and appellant said he did not know. Wedderburn then asked if he could remove the object and appellant consented. Wedderburn then asked appellant "if he would mind if I handcuffed him while I went to do that in case he wanted to kick me." Appellant said he did not mind and assured Wedderburn he would not kick Wedderburn.

The object was a small piece of plastic that contained a small wad of white paper. Wedderburn believed the contents could be an unlawful controlled substance. The wad of paper contained a green leafy substance Wedderburn believed to be marijuana. Wedderburn escorted appellant to Wedderburn's patrol car and had appellant take a seat.

Wedderburn continued the search of the car, unwrapped several Taco Bell wrappers laying on the passenger's side floorboard directly between where appellant's feet had been, and found a brown wad of foil. The foil contained a white or off-white, rock-like substance, which was later identified as about 1.5 grams of methamphetamine with a street value of $150.

Appellant was arrested and Officer Young took him to the police station. At the police station, a number of tests were given to appellant by Wedderburn to determine if he was under the influence of a controlled substance. As a result of the tests, Wedderburn formed the opinion that appellant was under the influence of a central nervous system stimulant. Appellant's blood tested positive for methamphetamine, and a toxicologist opined that appellant was under the influence of methamphetamine at the time his blood sample was taken.

Once at the police department, appellant volunteered to Wedderburn that he had given Wedderburn a false name and admitted his true name. Appellant apologized to Wedderburn for giving him a false name and told Wedderburn that he was on parole. Appellant then told Wedderburn that his correct identification was in his right shoe. Wedderburn retrieved the identification card from under the padding of appellant's right shoe and also looked in appellant's shoes and socks. Inside appellant's right sock under his foot, Wedderburn found a clear plastic baggie containing a green leafy substance he believed was marijuana. Wedderburn opined that the total quantity of marijuana found on appellant was probably less than an eighth of an ounce.

Officer Young booked appellant into the jail and was present during the strip search of defendant. The search revealed a syringe and hypodermic needle taped to the inside of appellant's boxer shorts.

DISCUSSION

I

PERSONAL CONSENT OF DEFENDANT IS NOT REQUIRED TO FORGO THE USE OF CALJIC NOS. 2.60 AND 2.61

Appellant presents the novel question of whether or not the trial court erred when it accepted defense counsel's waiver of a request for CALJIC Nos. 2.60 [Defendant Not Testifying - No Inference of Guilt May be Drawn] and 2.61 [Defendant May Rely on The

State of The Evidence] without obtaining a personal waiver from appellant. The record reflects the following discussion of defense counsel's waiver of these two instructions:

> "MS. FOCHETTI [deputy district attorney]: Also, we were going to -- I would request the defendant put his waiver -- or the defense attorney put his waiver of requesting CALJIC instructions 2.60 and 2.61 on the record.
>
> "MR. OLIVER [defense counsel]: That's true, I specifically do not request that for the defendant. Tactically, I find that I think it's less beneficial to -- to give those instructions.
>
> "THE COURT: Okay."

In *People v. Ernst* (1994) 8 Cal.4th 441, the Supreme Court held that a defendant's right to a jury trial can only be waived personally by the defendant. A personal waiver of the right to trial by jury is explicitly required by the California Constitution. (Cal. Const., art. I, § 16.) Case law also requires personal waivers for other "fundamental" rights of a personal nature. "It is for the defendant to decide such fundamental matters as whether to plead guilty [citation], whether to waive the right to trial by jury [citation], whether to waive the right to counsel [citation], and whether to waive the right to be free from self-incrimination [citation]. As to these rights, the criminal defendant must be admonished and the court must secure an express waiver; as to other fundamental rights of a less personal nature, courts may assume that counsel's waiver reflects the defendant's consent in the absence of an express conflict. [Citation.]" (*In re Horton* (1991) 54 Cal.3d 82, 95, fn. omitted.)

Outside of a handful of "fundamental" rights of a personal nature, an accused surrenders control over defense strategies and tactics in his case to defense counsel. (*In re Horton*, *supra*, 54 Cal.3d at p. 95.) For example, in *People v. Bradford* (1997) 14 Cal.4th 1005, 1052, the Supreme Court ruled a trial court has no duty "to sua sponte inform [a defendant] of his right to testify and to obtain an express personal waiver of

that right." One factor distinguishing the right to a jury trial from the right to testify is the absence of a provision in the California Constitution requiring an express personal waiver of the right to testify.

While recognizing that the instructions relate to the fundamental right concerning self-incrimination and to the presumption of innocence, we conclude the right to have the jury instructed using CALJIC Nos. 2.60 and 2.61 is not, in itself, a "fundamental right of a personal nature" which requires an express personal waiver by a defendant. First, no provision of the California Constitution or California case law explicitly requires an express personal waiver by a defendant of the right to have the jury instructed under CALJIC Nos. 2.60 and 2.61.

Second, as recognized by the parties, decisions concerning which instructions to request and which instructions to waive generally are matters of tactics. The record in this case shows defense counsel's reason for not requesting the instructions was tactical. The Supreme Court has recognized that it is debatable whether or not a defendant receives an advantage from an instruction forbidding the jury to draw any inference of guilt from the defendant's failure to testify because it draws the jury's attention to his silence. (See *People v. Gardner* (1969) 71 Cal.2d 843, 854.) As a result, California courts have not imposed a sua sponte duty to give the instructions. (See *People v. Holt* (1997) 15 Cal.4th 619, 687.) In light of the treatment historically given to the instructions currently set forth in CALJIC Nos. 2.60 and 2.61, the right to have those instructions given cannot be characterized as a "fundamental" right, much less the equivalent of any of the four fundamental rights of a personal nature identified in *In re Horton*, *supra*, 54 Cal.3d at p. 95, which require a personal waiver.

Accordingly, we will not create a new duty requiring trial courts to seek, sua sponte, personal waivers from defendants when their attorneys request CALJIC Nos. 2.60 and 2.61 not be given.

II*

THE INSTRUCTIONS CONCERNING INTENT, MENTAL STATE AND CONCURRENCE WITH ACT WERE ADEQUATE

Appellant contends the trial court erred by failing to instruct the jury regarding the necessity for the concurrence of act or conduct with the specific intent or the mental state of the crime charged. Further, appellant contends the trial court erred by failing to limit the use of the CALJIC No. 3.30 [Concurrence of Act and General Criminal Intent] to the under-the-influence charge. Respondent contends appellant waived any error, the instructions concerning intent and mental state were adequate under the facts of this case, and the error, if any, in the instructions was harmless.

Both the prosecution and the defense requested CALJIC No. 3.30 and it was given to the jury. Appellant initially requested other instructions concerning intent and state of mind, namely, CALJIC Nos. 3.31 [Concurrence of Act and Specific Intent], 3.31.5 [Mental State] and 4.21 [Voluntary Intoxication-When Relevant To Specific Intent]. However, appellant withdrew his request for these instructions and the record does not reflect the reasons for the withdrawal. CALJIC Nos. 3.31, 3.31.5 and 4.21 were not given to the jury.

Instructions

During closing argument, defense counsel conceded appellant's guilt on count III (being under the influence) and count IV (falsely identifying himself to a police officer).

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* See footnote, *ante*, page 1.

Consequently, misinstruction on those counts, if any, is harmless beyond a reasonable doubt. (See *People v. Flood* (1998) 18 Cal.4th 470, 504 [instructional error as to an element of a crime is harmless where the element is conceded].) Therefore, the analysis of the instructions concerning intent and mental state will focus on the other two counts.

As to count I, transportation of methamphetamine, the jury was instructed: "In order to prove this crime, each of the following elements must be proved: [¶] One, a person transported methamphetamine, a controlled substance. [¶] And, two, that person knew of its presence and nature as a controlled substance. [¶] Three, that the substance transported was in an amount sufficient to be used as a controlled substance." As to count II, possession of marijuana, the jury was given definitions of constructive possession and actual possession and further instructed: "In order to prove this crime, each of the following elements must be proved: [¶] One, the defendant exercised control over, or the right to control a certain controlled substance; [¶] Two, the substance was not more than 28.5 grams of marijuana; [¶] Three, the defendant knew of its presence; [¶] Four, the defendant knew that the substance had a narcotic character; [¶] And, five, the substance was in an amount sufficient to be used as marijuana." CALJIC No. 3.30 was given to the jury in the following form:

> "In the crime[s] charged there must exist a union or joint operation of act or conduct and general criminal intent. General intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, [he] is acting with general criminal intent, even though [he] may not know that [his] act or conduct is unlawful."

With respect to the charges of transportation of methamphetamine and possession of marijuana, appellant asserts "[t]he last sentence of CALJIC No. 3.30 informs the jury that it need only find that [appellant] intended to do a criminal act to be guilty, and implies that lack of knowledge about the circumstances making the act illegal -- such as knowledge about whether the substance was a drug, for example -- is irrelevant to a

determination of guilt." Appellant also argues CALJIC No. 3.31.5 should have been given sua sponte because the crimes require proof appellant had a certain mental state.

1. Failure to limit CALJIC No. 3.30 to crimes without a mental state.

The Use Note to CALJIC No. 3.30 states that "it is error to instruct on general criminal intent without properly limiting the instruction to crimes which do not [require] specific intent. [Citations omitted.]" Appellant asserts, in effect, this limitation on CALJIC No. 3.30 should be read to require limiting the instruction to crimes which do not require specific intent *or a mental state*.

"'"It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."' [Citations.]" (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) "The meaning of instructions is no longer determined under a strict test of whether a 'reasonable juror' *could* have understood the charge as the defendant asserts, but rather under the more tolerant test of whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70-75; *Boyde v. California* (1990) 494 U.S. 370, 378-381; *People v. Kelly* (1992) 1 Cal.4th 495, 525; *People v. Benson* [(1990) 52 Cal.3d 754,] 801.)" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

Under the facts of this case, there is not a reasonable likelihood that the jury thought it could find the appellant guilty of the transportation charge or the possession charge without finding he had the requisite knowledge. First, the instructions on the elements of each crime clearly required the jury to find appellant knew of the presence and nature of the methamphetamine, knew the substance alleged to be marijuana had a narcotic character, and knew of the presence of the marijuana.

Second, the arguments made by counsel to the jury reiterated the elements of each crime, including the knowledge requirements. In addressing the possession charge, the deputy district attorney told the jury: "We also have to prove that the defendant knew what the substance was, or knew of its narcotic character." The deputy district attorney also mentioned the evidence showing appellant knew of its presence in his sock. As to the transportation charge, the deputy district attorney said, "We have to prove though that he knew its presence and nature. Well, since he uses methamphetamine, it's in his system, clearly he knows what the drug is.… [¶] So, that really boils down to, did the defendant know [the methamphetamine] was there?" Appellant's main argument to the jury against the possession charge was that the opinion evidence offered to prove the green leafy substance was marijuana was inadequate to carry the prosecution's burden of proof. Appellant's primary argument against the transportation charge was that Cabral was the one solely responsible for the methamphetamine.

In light of all of the instructions given, the evidence of the case, and the arguments of counsel, it is not reasonably likely the jury would construe the last sentence of CALJIC No. 3.30 as relieving the prosecution of the burden of proving the elements regarding appellant's knowledge. Appellant's assertions also fail under the stricter test because a "reasonable juror" could not have understood the instructions as implying that appellant's knowledge of the nature and presence of the methamphetamine and knowledge of the presence and the narcotic character of the marijuana were irrelevant to proving the crimes. Therefore, the trial court did not err when it did not limit CALJIC No. 3.30 to the charge of being under the influence.

2. Failure to give CALJIC No. 3.31.5.

CALJIC No. 3.31.5 tells the jury "there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists the crime to which it relates is not committed." Appellant asserts "[w]hen the

definition of a crime requires proof that the defendant had a certain mental state, the CALJIC 3.31.5 must be given sua sponte. (*People v. Cleaves* (1991) 229 Cal.App.3d 367, 381; see *People v. Honig* (1996) 48 Cal.App.4th 289, 338.)"

In *People v. Cleaves*, *supra*, 229 Cal.App.3d at p. 381, the court stated, "since second degree murder based on implied malice is a general intent crime but with the requirement of a certain mental state, to avoid confusion the trial court then should also have given CALJIC No. 3.31.5, or a modification thereof." (Fn. Omitted.) In that case, the defendant had assisted a person with AIDS to strangle himself. The court proceeded to hold any error was harmless because under the circumstances the juror would only have convicted defendant if it found the mental state, i.e., knowledge and conscious disregard of the risk to human life, existed jointly with the conduct of tying up and holding the deceased down.

Because the general intent crimes of transportation of methamphetamine and possession of marijuana also require a certain mental state, i.e., knowledge of the presence and nature of the drugs, it is assumed arguendo the trial court had a sua sponte duty to give CALJIC No. 3.31.5. However, the failure to give that instruction was harmless error because the facts of this case do not raise the issue of whether the appellant's conduct existed in union with the required mental states. First, the straightforward and accurate instructions on the elements of the transportation charge and the possession charge do not imply the knowledge requirements may be disjoined from the prohibited conduct. Second, the arguments made by counsel did not raise any scenarios where the proscribed conduct did not jointly operate with the required mental states. Third, on appeal, appellant does not offer a theory of how the evidence would allow the jury to find the required states of knowledge existed but did not concur with the conduct of transporting the methamphetamine or possessing the marijuana. (See *People v. Honig, supra,* 48 Cal.App.4th at p. 339 [rejection of defendant's request for 3.31.5 was harmless error; facts did not raise the issue of unity of conduct and mental state].)

III*

INSTRUCTIONS CONCERNING VOLUNTARY INTOXICATION WERE NOT REQUIRED

Appellant initially requested CALJIC No. 4.21 [Voluntary Intoxication-When Relevant to Specific Intent] be given to the jury, but later withdrew his request. The record does not reflect why this request was withdrawn. Because defense counsel conceded appellant was guilty of being under the influence of a controlled substance in his closing argument, it is unlikely the instruction was withdrawn to lessen the probability of a conviction for being under the influence of methamphetamine. No other instructions concerning voluntary intoxication were requested by defense counsel or the prosecution. The trial court did not give any instructions addressing voluntary intoxication.

Sua Sponte Duty to Instruct Concerning Intoxication

In *People v. Saille* (1991) 54 Cal.3d 1103, 1120, the Supreme Court held that any sua sponte duty to instruct on voluntary intoxication did not continue after abolition of the diminished capacity defense. This holding was confirmed by the Supreme Court in *People v. Castillo* (1997) 16 Cal.4th 1009, 1014, when it stated: "Under *Saille*, therefore, the court did not have a sua sponte duty to give *any* instruction on the relevance of intoxication …."

Appellant contends *People v. Castillo, supra*, 16 Cal.4th 1009, and *People v. Saille, supra*, 54 Cal.3d 1103, do not stand for the proposition that "the trial court never has the duty to give any instruction about voluntary intoxication sua sponte." Appellant further contends that voluntary intoxication is a defense to the specific intent crimes and the evidence supporting the defense was strong enough to require the trial court to give

* See footnote, *ante*, page 1.

the instruction. Two of the cases relied upon by appellant are *People v. Rathert* (2000) 24 Cal.4th 200 (*Rathert*), and *People v. Mendoza* (1998) 18 Cal.4th 1114 (*Mendoza*).

In *Rathert, supra*, 24 Cal.4th at page 205, the Supreme Court stated that the classification of an offense "into either the specific or the general intent category … is necessary 'only when the court must determine whether a defense of voluntary intoxication or mental disease, defect, or disorder is available; whether evidence thereon is admissible; or whether the appropriate jury instructions are thereby required. [Citation.]' (*People v. Hering* (1999) 20 Cal.4th 440, 446-447 [84 Cal.Rptr.2d 839, 976 P.2d 210].)" However, this quoted language was not necessary to the holding in *Rathert, supra*, which considered whether a charge of false impersonation under section 529 should include a specific intent element. Also, the facts of that case did not involve intoxication and the court did not address whether situations might arise where a trial court had a sua sponte duty to instruct on voluntary intoxication. The reference in *Rathert* to "required" instructions is explained by the principle that once a court has chosen to instruct on voluntary intoxication, it is required to do so correctly. (See *People v. Castillo, supra*, 16 Cal.4th at pp. 1014-1015.)

In *Mendoza, supra*, 18 Cal.4th at pp. 1126-1134, the Supreme Court primarily addressed the admissibility of evidence of voluntary intoxication. After analyzing the question of admissibility, the Supreme Court explicitly recognized, in a one-paragraph discussion about instructions, there is no sua sponte duty to instruct on voluntary intoxication. (*Id*., at p. 1134.)

Accordingly, the principle set forth in *People v. Castillo, supra*, 16 Cal.4th at page 1014, and *People v. Saille, supra*, 54 Cal.3d at page 1120, that a trial court has no sua sponte duty to instruct on voluntary intoxication was not circumscribed by either *Rathert*

or *Mendoza*. Therefore, the trial court had no sua sponte duty to instruct the jury concerning voluntary intoxication.

IV[*]

ERRONEOUS INSTRUCTION ON ELEMENTS OF THE SECTION 148.9 OFFENSE WERE NOT PREJUDICIAL

Appellant contends the trial court erred when it failed to instruct the jury that to convict him under section 148.9 they must find he was "detained" at the time he falsely identified himself. Appellant further contends the misdemeanor of false identification is a specific intent crime and "the superior court erred when it failed to give CALJIC No. 3.31 [Concurrence of Act and Specific Intent] and an appropriate instruction limiting the use of CALJIC No. 3.30 [Concurrence of Act and General Criminal Intent]." Respondent concedes the instructions concerning false identification contained error, but contends the error was harmless beyond a reasonable doubt because defense counsel conceded guilt to the charge in his closing argument.

Section 148.9, subdivision (a) provides, "Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer listed in [Penal Code] Section 830.1 or 830.2, ... upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor."

Defense counsel proposed the elements required by section 148.9 be set forth in an instruction based on CALJIC No. 16.102 [Resisting Arrest] and the trial court modified that proposal.[3] Appellant did not object to the instruction as given, which stated in part:

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[*] See footnote, *ante*, page 1.

[3] No CALJIC instruction sets forth the elements of a violation of section 148.9.

"In order to prove this crime, each of the following elements must be proved: [¶] One, a person falsely represented or identified himself to a peace officer; [¶] Two, at the time the peace officer was engaged in the performance of his or her duties; [¶] And, three, the person who falsely identified himself knew or reasonably should have known that the other person was a peace officer; [¶] And, four, the person provided the false information in order to evade the process of the court or to evade the proper identification of the person by the investigating officer."

The jury was further instructed: "A peace officer is discharging or attempting to discharge, or is engaged in the performance of his or her duties if he or she is lawfully detaining or attempting to detain a person for questioning or investigation." CALJIC No. 16.108 [Lawful Detention - Defined] also was given to the jury; however, this instruction focused on the lawfulness of the detention and did not define the line between consensual police encounters and lawful detentions. (See *In re Voeurn O.* (1995) 35 Cal.App.4th 793, 796 [minor's false statement of identity made during consensual police encounter; conviction under section 148.9 reversed].)

The instructions given to the jury were erroneous because they did not require a finding that the appellant was lawfully detained at the time he falsely identified himself. The jury could have found the officer was only attempting to detain appellant when appellant falsely identified himself. Also, the jurors may have failed to understand the proper scope of "detention" because they were not instructed on the distinction between detention and a consensual police encounter. However, counsel did not argue appellant, at the time he identified himself to Wedderburn, was not detained or lacked the specific intent to evade proper identification by the police. Instead, appellant's guilt was conceded.

"A trial court's failure to instruct the jury on an element of the crime requires reversal when 'the defendant contested the omitted element and raised evidence sufficient

to support a contrary finding ....' (*Neder v. U. S.* (1999) 527 U.S. 1, 19 [119 S.Ct. 1827, 1838, 144 L.Ed.2d 35] (*Neder*).) The high court in *Neder* also pointed out that the error is not prejudicial when on appeal it is clear 'beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence ....' (*Id*. at p. 17 [119 S.Ct. at p. 1837].)" (*People v. Garcia* (2001) 25 Cal.4th 744, 760-761.)

"One situation in which instructional error removing an element of the crime from the jury's consideration has been deemed harmless is where the defendant concedes or admits that element. (*Connecticut v. Johnson* [(1983) 460 U.S. 73,] 87 ….)" (*People v. Flood, supra*, 18 Cal.4th at p. 504.)

In this case, appellant conceded guilt on the false identification count. Thus, any instructional error was harmless beyond a reasonable doubt. Similarly, appellant's claims concerning the insufficiency of the evidence to show detention also are rejected.

V[*]

SUFFICIENT EVIDENCE SUPPORTS THE TRANSPORTATION CONVICTION

Appellant claims there was insufficient evidence to show (1) he conveyed the methamphetamine while he was in the car and (2) he had knowledge of the presence of the methamphetamine on the floor of the car.

On appeal "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People* v. *Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence includes circumstantial evidence and

[*] See footnote, *ante*, page 1.

the reasonable inferences flowing therefrom. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.)

As discussed in Part VI, *infra*, the transportation charge was argued to the jury on a constructive possession theory -- both trial attorneys focused on whether or not appellant was in constructive possession of the methamphetamine found in the wrapper. The circumstantial evidence was sufficient to establish appellant knew the methamphetamine was present, knowingly exercised control over it, i.e., constructively possessed it, and transported it.

The methamphetamine was found on the passenger's side floorboard, directly between where appellant's feet had been. While Wedderburn searched Cabral, appellant was moving around on the passenger side of the car and was reaching into the Taco Bell bag. Appellant was under the influence of methamphetamine and possessed a needle and syringe associated with methamphetamine use. Cabral was not under the influence of drugs and was not in possession of any paraphernalia, other than rolling papers. In addition, no drug paraphernalia was found in Cabral's car.

The foregoing circumstantial evidence provides a foundation of substantial evidence from which the jury could reject appellant's contention that the methamphetamine was Cabral's and reasonably infer appellant transported the methamphetamine and knew of its presence. Accordingly, appellant's claim regarding the lack of sufficient evidence to sustain the transportation conviction is rejected.

VI*

INSTRUCTIONS ON AIDING AND ABETTING WERE NOT REQUIRED

As an alternative to his contention that the evidence is insufficient to support the conviction for transporting methamphetamine, appellant argues the trial court should have given sua sponte both CALJIC Nos. 3.00 and 3.01 concerning aiding and abetting in connection with the transportation charge. Appellant asserts the prosecution told the jury that "possession is not an essential element of transportation" and, as a result, raised an aiding and abetting theory because if appellant "did not have actual or constructive possession of the methamphetamine, and did not drive the car, he did not move methamphetamine, and cannot be liable for its transportation unless he aided and abetted Cabral in transporting it."

Respondent argues that the transportation count was not prosecuted under an aider and abettor theory and, therefore, the trial court had no sua sponte duty to instruct on aiding and abetting. Appellant replied to this argument by asserting the respondent mischaracterized the way that the case was tried. Accordingly, the initial question presented here is whether or not the case was tried on an aider and abettor theory.

The jury was instructed of the elements of transportation of a controlled substance under CALJIC No. 12.02, which provides in part: "Possession is not an essential element of transportation. A person may transport drugs even though the drugs are in the exclusive possession of another." In closing argument, the deputy district attorney did refer to this portion of the instruction, but that reference must be placed in context to determine if an aiding and abetting theory was argued to the jury:

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* See footnote, *ante*, page 1.

"Which brings us to the final offense, and the one that I believe is going to be the most controverted, which is whether or not the defendant is guilty of transporting methamphetamine.

"The same possession requirements the court went over with you, which you have on page 16, that apply to possession of marijuana, are the same definitions that apply to possession of methamphetamine. It can be actual possession, it can be constructive possession, which are defined there for you. And it also can be no possession at all, because possession is not an essential element of transportation. However, it's a factor you can consider in determining whether or not the defendant is guilty.

"When a person carries a controlled substance in a vehicle, they are transporting it. And so it's the People's position that the defendant had constructive possession of the methamphetamine that was in the bindle near his feet. He had the ability to exercise dominion and control over that item, and, therefore, he is responsible for Count I.

"We have to prove though that he knew of its presence and nature. Well, since he uses methamphetamine, it's in his system, clearly he knows what the drug is. We know that a gram and a half, about hundred and fifty dollars worth of the drug, is a usable quantity.

"So, that really boils down to, did the defendant know it was there? I'm sure the defense will tell you that this was Mr. Cabral's drugs, that he probably saw the officer pulling up behind him, put it in his taco wrapper and tossed it over there on the floor and the defendant knew nothing about it. [¶] … [¶]

"And we have -- it's unreasonable to assume that someone would take a hundred and fifty dollars worth of drugs, wrap it in trash and put it somewhere where someone unwitting would have access to and may accidentally throw it away, especially another drug user who's familiar with the fact and is there with another person.

"Also, keep in mind we have no evidence that Mr. Cabral was a drug user. The officers looked at him that night, they didn't see any evidence that he was under the influence, and I can assure you the officers were looking for that. And ask yourselves, would the officers have any reason to arrest Mr. Cabral as well if he was showing signs of being under the influence, especially in light of the fact that more than one person can be in possession of a drug at a time?

"They looked at him, they saw no signs that he was under the influence. They searched him. There was no evidence of any paraphernalia used to ingest methamphetamine found on his person. There were no drugs found on his person. There was no -- nothing found in his car used to ingest methamphetamine. And there was nothing found in his car that was any other contraband, besides the bindle of methamphetamine.

"The defendant had the opportunity to place that bindle there. He was the one the officer observed having contact with that area while he was talking to the driver. He's the one that's under the influence. He's the one with the syringe in his underwear, the syringe that's the type used to one of the uses of it is to inject methamphetamine. He's the one with the other illegal drug on his person.

"I submit to you, based on the totality of the circumstances, that the defendant is guilty as charged.

"Thank you."

The deputy district attorney clearly stated the prosecution's theory was based on defendant's constructive possession of the methamphetamine. Her rebuttal to defense counsel's closing argument continued to assert a constructive possession theory: " … [I]t doesn't matter whether those drugs belonged to both him and Mr. Cabral. The fact of ownership is not relevant. The fact of dominion and control is." Furthermore, with reference to the paragraph in the instructions that stated possession was not an essential element of the transportation charge, defense counsel told the jury:

"But the last paragraph there [in the Count I instruction], possession is not an essential element. But pick up the word 'essential.' Somebody, and this is the People, the way they argue their case, they're arguing that Mr. Towey had to have either direct or constructive possession of that particular methamphetamine on the floor of that vehicle, because otherwise they can't convince you that that crime has been proved. So, it really does exist in this case. It's not just that he was aware of it."

The record clearly shows that neither party presented an aiding and abetting theory on the transportation claim to the jury; instead, each side argued a constructive possession theory. Thus, appellant's claim that an aiding and abetting theory was presented to the

jury is rejected. As a result, the trial court had no sua sponte obligation to instruct the jury on aiding and abetting using CALJIC Nos. 3.00 and 3.01. (See *People v. Sassounian* (1986) 182 Cal.App.3rd 361, 404-405, cert. denied (1987) 481 U.S. 1039 [defendant's assertion he was tried on an aider and abettor theory rejected; thus, he was not entitled to sua sponte instructions on aiding and abetting].)

VII*

BOYKIN-TAHL-YURKO ADVISEMENTS WERE REQUIRED BEFORE APPELLANT ADMITTED ENHANCEMENT ALLEGATIONS

Defense counsel and the deputy district attorney agreed before the trial that the enhancement allegations would be bifurcated and appellant would admit the allegations in the event he was convicted. Appellant's counsel stated, " … [Appellant] will admit the special allegation that would go to the enhancements only. So, that will preclude the reading of the [enhancement allegations in the] Information …." The trial court then advised appellant of his right to a jury trial on the enhancement allegations and obtained appellant's personal waiver. As agreed by defense counsel and the deputy district attorney, when the charges were read to the panel of potential jurors, the enhancement allegations in the information were omitted.

At the bifurcated court hearing, the prosecution presented abstracts of conviction and requested they be admitted into evidence. Defense counsel stated, "Yes, your Honor, and I I believe that my client admitted that to you earlier anyway. So, I think you can make the finding." The trial court asked if it was agreeable for the court to consider "the evidence that was presented before the jury?" Defense counsel answered, "Yes. The

* See footnote, *ante*, page 1.

admissions, yes." No evidence was presented by the defense. The trial court then found the enhancement allegations were true.

A. *Yurko* Error.

Appellant argues the special findings regarding the enhancements should be reversed because he was not advised, as required by *Yurko*, *supra*, 10 Cal.3d 857, of certain rights before he admitted the prior convictions. Respondent contends reversal is not appropriate because (1) the rule requiring advisement of rights when a defendant submits the question of his guilt on transcripts or documents should not apply to true findings of prior convictions; (2) the admission by defendant regarding the prior convictions and prison terms was voluntary and intelligent notwithstanding the lack of *Boykin-Tahl* advisements; and (3) defendant was not prejudiced by the failure to give the advisements.

Before a criminal defendant enters a plea of guilty, the court must give what have come to be commonly called the *Boykin-Tahl* advisements, i.e., the court must advise the defendant that he has a privilege against self-incrimination, a right to a jury trial and a right to confront and cross-examine witnesses, and that by pleading guilty he forfeits these rights. (*Boykin*, *supra*, 395 U.S. 238; *In re Tahl*, *supra*, 1 Cal.3d 122.) In *Yurko*, the Supreme Court held the same procedure applies when a defendant admits a prior conviction alleged as an enhancement for sentencing purposes. In addition, the *Yurko* court held, as a judicially created rule of criminal procedure, that a defendant who admits a prior conviction allegation must also be first advised of certain consequences of his admission, including the "precise increase in term or terms that might be imposed ...

[and] the effect … on the accused's eligibility for parole." (*Yurko, supra*, 10 Cal.3d at p. 864, fn. omitted; see *People v. Reed* (1998) 62 Cal.App.4th 593, 601-602.)[4]

To determine if there was *Yurko* error, an appellate court must review the trial record to see if it expressly demonstrates (i) the defendant who admitted the prior conviction was warned of the three specific constitutional rights he was forgoing, and (ii) he had waived those rights. (*People v. Allen* (1999) 21 Cal.4th 424, 437.) If *Yurko* error exists, then the appellate court must determine if the record affirmatively demonstrates that the admission of the prior conviction was "voluntary and intelligent under the totality of the circumstances," (*People v. Howard* (1992) 1 Cal.4th 1132, 1178 (*Howard*)) which necessarily "require[s] the appellate court to examine the entire proceeding. (See, e.g., *People v. Torres* (1996) 43 Cal.App.4th 1073, 1079-1082 [51 Cal.Rptr.2d 77] [totality of circumstances shows admission of prior convictions not voluntary or intelligent]; *People v. Murillo* (1995) 39 Cal.App.4th 1298, 1303-1304 [46 Cal.Rptr.2d 403] [record establishes knowing and voluntary waiver of constitutional rights]; *People v. Moore* (1992) 8 Cal.App.4th 411, 416-418 [10 Cal.Rptr.2d 286] [silent record precluded conclusion waiver was voluntary and intelligent].)" (*People v. Allen, supra*, 21 Cal.4th at pp. 438-439, fn. omitted.)

In this case, *Yurko* error clearly exists. First, appellant admitted the allegation concerning the prior convictions and prison terms, thereby bringing this case within the purview of *Yurko*. Consequently, respondent's contention that this case should be analyzed under the principles applicable to the submission of a slow plea is rejected.

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4 The *Boykin-Tahl* rule also has been applied to submissions on preliminary examination transcripts that were tantamount to guilty pleas. (*People v. Levey* (1973) 8 Cal.3d 648.)

Second, although the trial court advised appellant of his right to a jury trial and obtained his personal waiver of that right, the *Yurko* requirements were violated by the failure to (1) advise appellant about his privilege against self-incrimination and his right to confront and cross-examine witnesses and (2) obtain appellant's express waiver of those rights on the record. Accordingly, the next step in the analysis is to determine if the appellant voluntarily and intelligently waived those rights.

B. Voluntary and Intelligent Waiver

In *Howard*, the Supreme Court addressed the appropriate standard of review for *Yurko* error, i.e., situations where the *Boykin-Tahl* advisements were not given to a defendant before his admission of prior felony convictions alleged as sentence enhancements. In *Howard*, the defendant admitted the special allegation that he had served a prior prison term for burglary and, based on the admission, the trial court found the enhancement allegations true and enhanced his sentence for noncapital crimes by one year. The trial court accepted the admission without first advising the defendant, expressly on the record, of his privilege against self-incrimination. However, the trial court "informed defendant that he had a right to force the district attorney to prove the prior conviction in a trial and that, in such a trial, he would have the right to a jury and to confront adverse witnesses." (*Howard*, *supra*, 1 Cal.4th at p. 1180.) The Supreme Court affirmed the special finding concerning the enhancement because "defendant's admission of the prior conviction was voluntary and intelligent despite the absence of an explicit admonition on the privilege against self-incrimination." (*Ibid*.)

Since *Howard* was decided, the Court of Appeal has addressed whether a defendant's admission of a prior conviction for sentencing purposes was "voluntary and intelligent" in a number of published cases. The presence of *Yurko* error has caused the Court of Appeal to reverse several admissions of prior convictions that were not voluntary and intelligent and remand the matter for further proceedings to determine the

truth of the allegations. (E.g., *People v. Campbell* (1999) 76 Cal.App.4th 305, 309-311 [no advisement or express waiver of any of the three constitutional rights -- findings on allegations of prior convictions reversed and remanded]; *People v. Carroll* (1996) 47 Cal.App.4th 892, 896-898 [no advisements given and defendant only asked if he wished to waive his right to trial -- admission of prior convictions reversed and remanded]; *People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246-1248 [defendant asked only if he waived his right to jury trial -- sentence reversed and remanded]; *People v. Torres*, *supra*, 43 Cal.App.4th 1073, 1079-1083 [defendant only advised of and waived his right to jury trial on the prior convictions allegations -- findings on those allegations reversed and remanded]; *People v. Witcher* (1995) 41 Cal.App.4th 223, 233-235 [defendant told only right he was waiving was right to trial by jury on issue of prior conviction -- failure to appropriately advise and secure waivers required a new sentencing hearing]; *People v. Stills* (1994) 29 Cal.App.4th 1766, 1770-1771 [no advisements or waivers on the record -- remanded for limited new trial on enhancement allegations]; *People v. Howard* (1994) 25 Cal.App.4th 1660, 1665 [no on-the-record advisement and waiver of the right to confrontation and the privilege against self-incrimination -- remanded]; *People v. Johnson* (1993) 15 Cal.App.4th 169, 178 [no advisement of rights, defendant was asked whether he was convicted or whether he wanted a jury trial -- remanded]; *People v. Moore* (1992) 8 Cal.App.4th 411, 416-418 [no advisement or waiver regarding the three constitutional rights -- remanded].)

In *People v. Randle* (1992) 8 Cal.App.4th 1023, the Court of Appeal ruled the defendant voluntarily and intelligently waived the three constitutional rights before admitting the prior convictions. In that case, the defendant was expressly advised of the three rights and expressly waived the rights of confrontation and cross-examination and self-incrimination, but did not expressly waive the right to trial by jury on the issue of enhancements. "At one point during the advisements, [Randle] appeared not to

understand that he had a right to a jury trial on the prior, had an unreported conversation with counsel, and then told the trial judge that he understood that right." (*Id*. at p. 1035.) As a result, the Court of Appeal concluded he voluntarily and intelligently gave up his right to a jury trial on the prior conviction, and upheld the sentence enhancement.

In this case, appellant was advised of and expressly waived his right to a jury trial on the allegations of prior convictions. However, there was no advisement of the right of confrontation and cross-examination or of the privilege against self-incrimination. From the record, it is not possible to determine if appellant was aware of these rights, was aware the rights applied in the context of a bifurcated trial on enhancement allegations, and was prepared to waive these rights as a condition of admitting his prior convictions and prison terms. (See *People v. Torres*, *supra*, 43 Cal.App.4th at p. 1082 [defendant was advised of and expressly waived his right to a jury trial, but there was no advisement or express waiver of the other two rights]; *People v. Johnson*, *supra*, 15 Cal.App.4th at p. 178 [defendant was asked whether he was convicted or whether he wanted a jury trial, no advisement was given].)

Respondent argues that the court can infer appellant "without a doubt understood he was waiving his three *Boykin/Tahl* rights by agreeing to" admit the enhancement allegations because (1) he was advised of and expressly waived his right to a jury trial, (2) he was in the midst of a jury trial, (3) he was represented by counsel and (4) he obtained the tactical benefit of not having the enhancement allegations read to the panel of prospective jurors. However, "[u]nder *Howard*, we are not permitted to imply knowledge and a waiver of rights on a silent record. [Citations.]" (*People v. Campbel*, *supra*, 76 Cal.App.4th at p. 310.) Moreover, the "'failure to follow the clear and long-established rules laid down by the Supreme Court cannot be cured by any effort on our part to scour the record for scraps of information the defendant might have gleaned on his own in assisting him in making an informed decision.' [Citation.]" (*Ibid*.)

Respondent also argues "appellant suffered no prejudice, because the documents presented by the prosecution show without question that he suffered the alleged prior convictions." While the likelihood appellant will actually benefit from a reversal of the trial court's findings regarding the enhancement allegations is a very practical concern, "[u]nder *Howard*, that is not the focus of our inquiry." (*People v. Stills*, *supra,* 29 Cal.App.4th at p. 1771, fn. omitted.) Instead, the strength of the factual basis for the admission is one factor among the totality of the circumstances (*Howard*, *supra*, 1 Cal.4th at p. 1180) relevant to the ultimate question of "whether the record … affirmatively shows that defendant's admission of the prior conviction constituted a knowing and voluntary waiver of his constitutional rights." (*Id*. at p. 1179.)

In light of the silent record regarding appellant's right of confrontation and privilege against self-incrimination, the record does not affirmatively show appellant voluntarily and intelligently waived his *Boykin-Tahl-Yurko* rights. Consequently, the true finding on allegations of appellant's prior convictions and prison terms is reversed, and the cause remanded for new proceedings to determine the truth of the allegations.

VIII*

USE OF CALJIC NO. 17.41.1 DID NOT VIOLATE THE RIGHT TO TRIAL BY JURY

Appellant presents a number of arguments concerning CALJIC No. 17.41.1.[5] He claims it (1) violated his right to an impartial jury by undermining the independence of

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* See footnote, *ante*, page 1.

[5] CALJIC No. 17.41.1 reads: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror ... expresses an intention to disregard the law or to decide the case based on ... any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

each juror and subjected the jurors to outside influence; (2) violated his state constitutional right to a unanimous jury by encouraging dissenters to conform, by interfering with the candor and secrecy of jury deliberations, and by being inconsistent with federal practice; (3) violated his right to a jury with the power of jury nullification, which power is an essential element of an independent jury under the Sixth Amendment and the California Constitution; and (4) denied his right to have every element proven beyond a reasonable doubt by undermining the requirement jurors apply the law to facts in light of their consciences.

In this case, the jury began its deliberations late on the morning of August 31, 1999, deliberated for about 50 minutes before breaking for lunch, reconvened and deliberated for about a half hour before sending a question to the judge about whether the methamphetamine was found in a wrapper or in a bag, and then reached its verdicts about a half hour later. No jurors were displaced during the deliberations. The record does not show any complaints about a juror refusing to deliberate or disregarding the law, a jury deadlock, or a holdout juror.

CALJIC No. 17.41.1, and the controversy, which follows it, is currently before the Supreme Court. (E.g., *People v. Engelman* (2000) 77 Cal.App.4th 1297 [review granted Apr. 26, 2000, S086462]; *People v. Taylor* (2000) 80 Cal.App.4th 804 [review granted Aug. 23, 2000, No. S088909]; *People v. Morgan* (2000) 85 Cal.App.4th 34 [review granted Mar. 14, 2001, No. S094101]; *People v. Sparks* (2001) 88 Cal.App.4th 1054, 1075 [review granted Aug. 15, 2001, S098290]; *People v. Phillips* (2001) 89 Cal.App.4th 61, 79-82 [review granted Sep. 12, 2001, S099017].)

Though this court has not yet addressed the issue in a published decision, we find no reason to undergo a lengthy analysis, given the imminence of a ruling by the Supreme Court. We simply state that we find the instruction proper. In particular, we conclude that CALJIC No. 17.41.1 does not intrude into a juror's deliberative thought processes or

eliminate jury secrecy. The instruction does not address proper subjective or objective deliberation, whether collective or individual; it addresses instead impermissible objectively expressed refusals to deliberate or breaches of duty by a juror. It is neither intrusive nor coercive, and simply reminds the jurors of their duty to decide the case before them on the basis of the evidence and the law as instructed by the court. (See *People v. Baca* (1996) 48 Cal.App.4th 1703, 1706.)

Accordingly, appellant's claims based on CALJIC No. 17.41.1 are rejected.

IX[*]

USE OF CALJIC NO. 17.42 WAS PROPER

In this case, the jury was instructed pursuant to CALJIC No. 17.42, which provides: "In your deliberations do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict." Appellant argues the second sentence of this instruction should have been modified so as not to interfere with the proper role of jury nullification and conscience.

Appellant concedes this instruction and similar instructions have been upheld by federal and state courts. "It is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.' [Citation.]" (*Shannon v. United States* (1994) 512 U.S. 573, 579.) In *People v. Nichols* (1997) 54 Cal.App.4th 21, 24, the court stated the use of CALJIC No. 17.42 was unquestionably correct.

In light of established precedent, the jury nullification cases pending before the Supreme Court, and the facts of this case, we decline to create a new rule of law by

[*] See footnote, *ante*, page 1.

requiring the modification of CALJIC No. 17.42. This holding is consistent with this court's prior analysis of the role of the jury in connection with information concerning potential penalties. (See *People v. Cardenas* (1997) 53 Cal.App.4th 240, 247-248 [trial court properly excluded mention of the three strikes law to the jury during voir dire].)

DISPOSITION

The convictions are affirmed and the findings of the enhancement allegations are reversed and remand for further proceedings consistent with this decision.

_____
Ardaiz, P.J.

WE CONCUR:

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Wiseman, J.

_____
Cornell, J.